

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1326

To be argued by
LAWRENCE STERN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA, :

Appellee, :

-against- :

KEVIN MANGAN, :

Defendant-Appellant. :

-----X

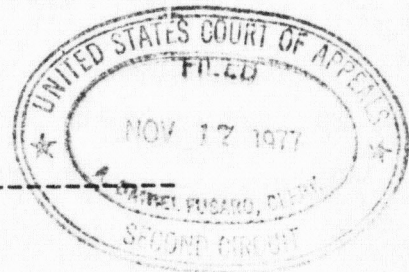
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77-1326

ON APPEAL FROM A JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF FOR APPELLANT



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ISSUES PRESENTED

1. Whether the refusal of the government fingerprint expert to disclose the specific analysis underlying his conclusion of identity, deprived appellant of his constitutional rights to confrontation and cross-examination and trial by jury and violated the federal rules of evidence. Whether the court's instructions that the witness was an expert was prejudicial.
2. Whether law enforcement encouragement, participation in, and receipt and use of the proceeds of a conspiracy to steal documents from appellant's office, without probable cause and without a warrant, required suppression of those documents under the Fourth and Fifth Amendment rights against invasion of privacy and to due process of law.
3. Whether undue restriction of the presentation of impeachment evidence against the handwriting analysis and the prosecutor's uncorrected suggestion in open court that defense counsel's cross-examination directed at that analysis was improper and dishonest, deprived appellant of cross-examination, fair trial, and due process of law.

4. Whether without evidence of mailing in the grand jury and at trial and without necessary instructions to the grand jurors on the quality of the evidence necessary to satisfy this element, mail fraud counts, which are, in any case, misapplied where fraud against the government is charged in duplicated statutory offenses, should be dismissed.

STATEMENT PURSUANT TO RULE 28(a)(3)

A. Preliminary Statement

This is an appeal from a judgment rendered in the United States District Court for the Southern District of New York [Stewart, J] on July 26, 1977, convicting appellant and his co-defendant Frank Mangan, after trial by jury of one count of conspiracy to defraud the government [18 U.S.C. §286], five counts of mail fraud [18 U.S.C. §1341], and seven counts of filing false income tax returns [26 U.S.C. §7206(a)], and sentencing appellant to concurrent terms of imprisonment of a year and a day on counts 1 to 4 and 7 to 9, and to a consecutive suspended sentence and three years probation on condition of psychiatric treatment on counts 5 and 6 and 11 to 13, and sentencing his co-defendant Frank Mangan to a term of imprisonment of two concurrent years on all counts.

Both defendants are presently at large on bail pending appeal.

Timely notices of appeal were filed and this Court has continued the assignment of Lawrence Stern as counsel for appellant in this Court, and has assigned the Legal Aid Society as counsel for Frank Mangan on appeal.

B. Statement of Facts

1. The Scheme and the Investigation

In November, 1972, the Internal Revenue Service began an investigation into a scheme that had extracted from the agency

approximately \$45,000 in unwarranted federal income tax refunds (T764-65, 1126-29*). The Service had concluded that seven 1040 forms for the year 1971, filed in January and February of 1972, and claiming refunds of approximately \$9000 each, were not prepared by, nor signed by, the legitimate taxpayers in whose names and social security numbers they were filed.** Indeed, the Service believed that the only truthful information on the returns were the names and social security numbers, which information was available to all the Internal Revenue Service employees in the Brooklyn District, the North Atlantic Region, and ultimately all over the country (T24-67, 136-141). Six checks had been issued, in the amounts claimed, to the addresses on the returns, and the error was not discovered until the returns of the "legitimate" taxpayers were received in the computers after the checks had already been issued. One check was stopped before issuance, and one of the checks that issued was not cashed. The returns and related bank documents were signed "John M." or "Jack M. McCarthy," even though the legitimate taxpayers named John McCarthy whose names and social security numbers were used had different middle initials. One return was filed in the name of Scott Murphy. (See the IRS tape run-offs of legitimate taxpayers, GE***8-10, 11-17 and the 1040's, GE1-7.)

* "T" numbered references are to pages in the trial transcript; "H" numbered references are to pages in the transcript of the pre-trial hearings of May 20-May 26, 1977

** At trial, the government produced only three "legitimate" McCarthy's to testify that three of the questioned returns were not prepared by them (T1032-34, 1116-17, 1204). Motions to dismiss the
footnote continued on next page

*** See following page for footnote.

The Service traced the bank accounts which had been opened in the same names and through which the Treasury checks passed, and gathered all the related bank documents (T106-113, 118-126, 244-262, 296-316, 318-327, 764-777). They went to the addresses on the returns which turned out to be transient hotels or rooming houses and gathered those relevant documents (T101-105, 211-213). In December, 1972, all these documents were submitted to a special agent of the Bureau of Alcohol, Tobacco and Firearms, Anthony Varcos. Varcos dipped them all in the ninhydrin solution which raises latent fingerprints. He found identifiable, "partial prints all over those documents" (T277, 279), including a Corporate Resolution (GE37A and B) used to open the corporate bank account in the name of McCarthy Enterprises, one of the accounts in the scheme. The prints on this document and the others would have been useful for identification, if a suspect had been available at the time, but the prints could not be used to isolate the suspect (T275-279). At the time of the trial, most of the prints Varcos had raised were faded since, if not retreated, the chemical tends to recede (T282). One of the prints was in fact retreated with ninhydrin. That was done to one print on the back of the Corporate Resolution (GE37B) in February, 1973, by FBI Agent Roy L. McDaniel; he also photographed the retreated latent. It was then used in comparisons of the prints of 261 people, mostly IRS employees, without "success" (T774-780).

Footnote continued from preceding page

counts related to the other returns for which no testimony of illegitimacy was adduced were denied (T1447-48).

*** "GE" refers to government exhibits; "DE" refers to defense exhibits.

In 1974, the case was closed (T1128).

In January, 1977, two months before the statute of limitations would expire on the mail fraud charges related to the scheme (T1301, 1307-8), the IRS, aware of the statute problem (T1301), was given Kevin Mangan's name as a suspect, and they interviewed John M. Bertsch who told them he was a participant with the Mangan brothers in the scheme. They compared appellant's fingerprints with the latent impression on the Corporate Resolution and a positive identification was effected.* The instant indictment, charging appellant and his brother Frank with one count of conspiracy to defraud the government, five counts of mail fraud and seven counts of filing false returns was returned on March 2, 1977, the last day under the statute of limitations.

2. Bertsch

John M. Bertsch testified that he was a participant in the scheme, and that he deposited \$25, 000 of the proceeds in his bank account in February through April, 1972 (T154). When the IRS agents first approached him in February, 1977, and confronted him with the scheme, he told them he had merely been appellant's driver on the trips to banks and rooming houses, and for that he had received some small remuneration. He did not tell the agents about his bank accounts and the proceeds of the crime (T28, 408-410). He saw a lawyer, learned he would probably be indicted, and learned that if

* Evidence presented at the pre-trial hearings, but not at trial, indicated that a disgruntled former business partner of appellant's, a man named John Calandra, had been attempting to find some prosecutable offense against appellant in the summer and fall of 1976, and that John M. Bertsch's brother told Calandra that Bertsch had been involved in the scheme. Calandra had been cooperating with the Suffolk County Police Department who gave the information to the IRS (See discussion of the hearings, infra).

he would offer to testify against someone, he could probably save himself at least 20 years in jail (T443-445, 450). During a second visit by the agents he told them about the \$25,000 in his bank accounts, but said he could prove through his bank records and canceled personal checks that he gave all that money in "mostly checks" to appellant, money that had come from the scheme which appellant had devised with his brother Frank (T157, 408-410).

The canceled checks tell another story, however, and Bertsch conceded at trial that they do not prove he gave the money to appellant (T420-424). A substantial number of the checks went for Bertsch's personal expenses, a car, clothes, downpayment on a house. Three or four thousand dollars was paid to his friend and business partner Ed Quinn, with whom he was to later buy bars and sell real estate (T155-157, 364, 369, 374). Bertsch explained that, although these monies went for the house, car, and to his business partner, he gave it all back to appellant, although he couldn't prove that. In fact, he kept the car and the house, and still owned the house at the time of the trial (T405-407), and had been collecting rents on it during that time in 1972 (T411).

Approximately \$7,000 of the checks was payable to Vast Industries and J-K Management, companies in which Bertsch, himself, with appellant, had a financial interest. Bertsch testified that he had first met appellant when the two then recent graduates from Long Island high schools were working as employees at Howard Johnson's in 1966. They both had worked their way into managerial positions there and had talked of eventually going into business to-

gether. In 1968 Bertsch went into the army (T376-377), and appellant went out on his own. By the time Bertsch returned, appellant was already established in the restaurant and catering business. Bertsch had nothing, but appellant offered him a job and still talked of being partners. Bertsch testified that appellant always had the money and the ideas and the promises, and that he didn't want to be appellant's employee; he wanted to be appellant's partner, but he never had enough money (T378, 382, 384, 388-389, 144-145).

At the time Bertsch was making out his checks to J-K Management and Vast Industries, he'd just become a partner in the former, with authority himself to draw checks on its account, and a partner in Vast Industries by virtue of J-K's partnership in Vast and his own position as secretary in the Vast Corporation, albeit without authority to draw checks on the latter account (T425-426, 158, 389, 391-392). Bertsch testified at first that he knew very little about Vast Industries (T156) and that he was not an officer of the corporation (T394), but later admitted that he was in fact an officer of Vast Industries* and had helped appellant physically renovate a storefront at 4020 Hempstead Turnpike, in Bethpage, which was Vast's headquarters and which was divided into several offices for rental to other tenants of Vast. Bertsch's brother installed the music system in the office complex (T1208,

* The prosecutor uncovered bank documents, after Bertsch's initial testimony, which gave the lie to the denials about Vast (T756-763).

1214-1215). Bertsch had also told the agents, contrary to facts, that he had received no money from American Banquet Corporation (T394), and in other contradictions testified initially that he didn't remember drawing money on the J-K Management account (T392), and that he was partners in a business, Venture Business Exchange with his long time associate Ed Quinn (T223) and that he was not partners with Quinn in that business (T401), and that the American Banquet office address that he used in his bank applications he did not really consider his business office (T386).

During this same period, appellant was operating the American Banquet Corporation, and its income, money from Bertsch and bank loans were available for the building of 4020 and the beginning of J-K Management (T397, 756-759, 761-763, GE57, DE-G).

Bertsch was a close friend and associate of appellant. He knew appellant's businesses and family and friends (T395-396, 470-471), and he worked in the offices of Tall Tree Country Club, Kevin Mangan Catering Corporation, and the American Banquet Corporation in the fall of 1971 and winter of 1972. In those offices, appellant, who was meticulous in business affairs, had various blank business, corporate, bank and tax forms. Bertsch also thought he might have helped in the transport of those forms from one office to another (T376-386). Bertsch knew that appellant used the name James Morrow in the American Banquet Corporation* (T404). Appellant accompanied Bertsch in Bertsch's car on those occasions when Bertsch was deposit-

* One of the scheme bank documents, a new account memorandum prepared by Chase Manhattan, gave the name James Morrow as a reference. No identification or check of these references was sought or required by the bank (T318-326). Testimony was adduced that appellant had in fact introduced himself as James Morrow to at least one person (T357).

ing his own United States Treasury checks received for veterans benefits (T388-389, 429, 470-471).

Bertsch testified that in September, 1972, he disassociated himself from appellant, because appellant wasn't making any money with Vast Industries and J-K Management (T405). Throughout this period 1971-1972, Bertsch was a friend and business associate of Ed Quinn, to whom he had paid three or four thousand of the scheme money. He had been in debt to Quinn in 1972 (T374), the same year he started a real estate business with Quinn (T369). After he left appellant, Bertsch stayed in business with Quinn, a man who took care of all the books and who at the time of the trial was looking for a job as an accountant (T243, 368). Bertsch himself had studied business and real estate at night (T371-372, 383), did office work in appellant's businesses and envisioned himself an operator in these areas. He and Quinn bought bars together and formed corporations after the Bertsch-Mangan split. Bertsch handled various stock transfers when the bars and the corporations that owned them changed names and forms (T368, 371). In his Bertsch-Quinn business years, post-Mangan, Bertsch's modus operandi includes falsifying loan applications (T450), failing to file and filing false federal and state income tax returns (T235-237), and falsifying liquor license applications which omitted any reference to his employment for late 1971, early 1972 (T433). He and Quinn had to get out of the bar-liquor business because of organized neighborhood petitions against the apparent practice in the bars of serving minors who used phony identification cards* (T434-

* The allegation was made by Bertsch that appellant had used a phony ROTC card to open one of the accounts (T151). Bertsch himself admitted to probably using these cards to drink illegally when he was underage (T378).

435). Bertsch remembered that Quinn was called down for an interview before the Alcohol and Beverage Control Board "regarding something along these lines" of an inquiry by a Congressman (Id.). After the bars, Bertsch and Quinn started Venture Business Exchange, a real estate sales corporation. Bertsch, who was or was not partners in this business (T223, 407), left Quinn after a year of that because the business had made only one sale and was not making any money for Bertsch (T222, 363).

By the time of the trial, having met several times with the agents, his lawyers, and the prosecutor, Bertsch knew about the government's evidence, the documents, fingerprints, handwriting analysis, and had discussed with them the name McCarthy on the returns (T438-440). Bertsch knew that he faced a possible 40-50 years on all the counts in the indictment besides the other charges for the crimes he had committed (T460). He hoped to save himself from jail by his testimony against the Mangans (T444). IRS Agent Robert Frey had met with his lawyer (T1303). The resultant deal was that in return for his testimony he would be permitted to plead to three misdemeanors and his lawyer told him that whatever sentence was imposed under the maximum one year terms would probably be imposed concurrently and that there was a good probability of probation. He also would not be prosecuted for his federal income tax violations, and the government would intercede on his behalf with State authorities. He was depending on the government to speak for him both before the federal judge and the state authorities. At the time of trial he hadn't been required to plead guilty (T445, 166-172, 235, 238-239).

His testimony was simple. Kevin had told him all about the scheme; that Frank Mangan, as an employee of the IRS would get the legitimate taxpayer information and Kevin would open the bank accounts and pick up the checks at the hotels and rooming houses. Bertsch said he went on some of these excursions and saw money and government checks, and that he opened bank accounts and kept the money from the scheme that Kevin had given him (T145-165). On one occasion he says he went with appellant to one of the empty rooms used as a mailing address; appellant wore gloves and told Bertsch not to touch anything (T147-148).^{*} Bertsch limited his responsibility to these aspects of the scheme, notwithstanding the fact that he signed his name alternately as "John M" or "Jack M," the same first names and initials used on the scheme documents even when the middle initials of the legitimate taxpayers differed (T361, GE8-10, 11-17, 1-7, T1032-34, 1204).

Bertsch was shown a pile of checks drawn on the American Banquet account and signed by appellant. These checks, stolen from appellant's office and turned over to the Suffolk County District Attorney who gave them to the IRS (see infra), were used by the government as "known" standards for comparison in the analysis of the writing and printing on the bank documents. Since the relevant writing on the checks used for the analysis were the amounts and

^{*} Appellant's fingerprints were found on a corporate resolution and one of the 1040 forms, and the government alleged his prints on two of the refund checks. No prints of Bertsch were found on the documents but no comparison was made by the government (see infra).

payees, no signature comparison having been attempted, Bertsch was asked if he could identify appellant's handwriting. He replied, "often enough to recognize it" (T166). Objection was made to his identification of that writing and a voir dire was conducted outside the jury's presence. On the voir dire and later before the jury, Bertsch testified that he never actually watched appellant write out the checks (T189), but that by virtue of his business association he knew that the signatures on the checks were definitely appellant's and that the amounts and payees names, "looks like it could be his" (T403, 174-175). He hadn't seen appellant's writing for five years (T176); it was possible the amounts and payee wrtings had been done by someone else, including himself and Ray Nazarro (T175-176, 181-185, 393, 400).

Bertsch was first shown these checks (GE33 and 34), and only these checks, in the prosecutor's office just prior to the trial. He knew the purpose of the identification (t178, 398, 439). He did not look at each check, and he returned the pile to the prosecutor with an identification of all the checks' amounts and payees written by appellant. He did not tell the prosecutor that others could have written those items (T177, 180-181, 400).*

At trial, when asked to look again, Bertsch segregated from the pile some checks he thought were not written by appellant (T175-176, 399, 402, GE37B). Counsel's motion to preclude Bertsch's identification of the "knowns" on the grounds of insufficiency and due

* In the defense case, Ray Nazarro would testify that he was closely associated with appellant in those years, that he wrote out some of those checks over appellant's signature, and that he could not say the others were in fact written by appellant (T1408-1413, 1420, DE P).

process violative suggestive procedures was overruled (T193-196). When it was discovered that a check not included in the pile presented to Bertsch had been used by the handwriting analyst as a "known" for the purpose of his chart comparison, Bertsch was brought back to the stand, over objection, to identify that check (T1209).

3. The Fingerprints

Prior to the start of the pre-trial hearings, counsel had been informed that the government would offer evidence that appellant's fingerprints were found on one set of the seven 1040's and its attachments and on a corporate resolution used in the scheme, a total of five prints on those two sets of documents. No reports, analyses, or charts or blow-ups on fingerprints or handwriting were furnished counsel, despite demands both oral and written as early as April 25, four days after counsel was assigned. Frank Mangan's counsel had made the demands a month earlier. By the end of the five days of hearings, on May 25, 1977, and as the start of the trial was imminent, the government was not able to furnish counsel with enlargements of those prints. Nor was the government prepared at that time with a handwriting analysis, which it had suggested it was hoping would identify appellant's handwriting as that of the bank documents (H540-543). Late that day, however, the government did provide the handwriting chart, and the next day, May 26, it provided one fingerprint enlargement (H550-556). The start of the trial was adjourned to May 31.

On the morning of May 31, the opening of the trial, the prosecutor for the first time informed counsel that the government would

offer evidence that appellant's fingerprints, three more in number, were on two of the tax refund checks cashed in the scheme. The government, over the five years of its investigation had not developed the checks for prints, and they were not submitted for development and analysis of latent impressions until May 20, 1977, the day proceedings began in this case (T87-94, 879-888, 908-911). The comparison analysis was not made until the first day of the trial (T1347), Counsel's objection to proceeding with opening statements without an opportunity to see and analyze the photographs of the new prints and analyze whatever alterations in the defense these would require were overruled, and the trial proceeded (T10). On June 1, Bertsch, the government's key "co-conspirator" witness began his testimony, and the defense had yet to receive for analysis the photographs of the three new prints on the refund checks. Counsel's objection to proceeding with that testimony until he could analyze the new prints was overruled (T68-71). The photographs were provided in the afternoon, after proceedings on June 1 (T163). On June 2, counsel sought a continuance for a detailed scientific analysis of the prints. This was also denied (T204-207).

One June 2, counsel also saw for the first time, in the midst of its offer into evidence, a crucial document in the case, a new account memorandum of the opening of one of the scheme accounts, (GE36C and 36P). Among the bank documents, this was the most damaging to the defense since it contained, as a reference, the name "James Morrow" which appellant used in his business as American Banquet Corporation. The document had been put in evidence before the grand jury. Objection to its admission were overruled (T248, 253, 419).

Ultimately, when the fingerprints were actually offered, appellant conceded that his fingerprints appeared on the corporate resolution (GE37B) and on the one set of 1040 forms and its W-2 attachment (GE2); these were the original five prints (one on the corporate resolution, three on the 1040 form, and one on the W-2 form) of which he had been informed prior to trial. The government produced enlargements of only two of these prints, the one on the corporate resolution and the one on the W-2 form. Since the government fingerprint experts testified that there was no way to determine when the latents were impressed on these forms, and that they could have been impressed when the forms were blank (T1373-74, 800-11), and since both John Bertsch and Ray Nazzarro testified that the same kind of blank forms lay around in appellant's offices,* appellant argued that Bertsch either intentionally or unintentionally used forms that appellant happened to touch in blank. There were other identifiable prints on the 1040 forms, bank documents, hotel documents, and refund checks. These prints were not appellant's, and the government never compared them to the prints of John Bertsch (T275-279, 1320, 1371-73, 891-893, 900-911).

Appellant did contest the fingerprint identification of the latents on the tax refund checks. Although it was possible that appellant had also touched these, handing them to Bertsch who was depositing them along with his U.S. Treasury veteran's benefit checks (T388-389, 470-471), these prints were the most incriminating

Corporate resolution blanks are available to anyone and can be obtained from the banks (T326).

evidence against appellant, and he determined that there had to be error in the identification. The two government fingerprint experts testified that an identification could be made only if there were at least seven corresponding points of comparison in the same position in relation to each other on the latent and inked impression, and no single unexplained dissimilar point on one or the other of the latent and inked impressions (T794-795, 99, 1329-36, 1342-43).

Police Officer Zachary Levin of the New York Police Department testified that he had concluded that three of the latents, on two of the refund checks, belonged to appellant (T1323). He also testified to the identification of the prints on the 1040, W-2 and corporate resolution and had prepared chart enlargements illustrating the points of comparison for the latent on the W-2 form and the corporate resolution, and these were displayed and described to the jury (T1324-25, GE79, T1379-80, GE80), as was the chart prepared by FBI agent Roy McDaniel, who testified, duplicating the identification of the same latent on the corporate resolution (T783, GE60). Officer Levin, however, had prepared no enlargements or charts for the latents on the refund checks nor for the other latents on the 1040 form.

On cross-examination, Officer Levin, who on direct examination, despite appellant's concession of the identification, gave the jury a detailed description of the points of comparison in his identification of the print for which he had made a chart (T1329-33), and who in the process emphasized the method of comparing the "specific" position of points and their "specific" relationship (T1329-33), admitted that he could not respond to questions about the specific points of comparison used in his identification of the latents on

the refund checks (T1349-54). He needed blow-ups to do that, he said (T1341, 1345-46). He had made no notes of his points of comparison (T1340, 1346). Having testified that no identification could be effected between two corresponding points on the inked and latent impressions if there were a different number of interceding ridges, he could not say whether or not there was an extra ending ridge between the core loop (staple) and the first complete loop (ridge) on the latent impression, which he had identified as the same as appellant's right index finger but which did not have the extra ridge in that position (T1347-48, GE73, GE46, GE48). He could not say whether or not there was a bifurcation, or joining of the third and fourth ridges, above the central loop on the latent impression, as opposed to a non-joinder of those ridges on the inked impression of appellant's left index finger that he compared positively to the latent (T1348-49, GE72). He could not show the jury that this difference was a similarity (T1351-52). He could not testify whether or not the core of that latent was composed of two short ridges (T1353). He could not testify to the presence or absence of a specific formation drawn by counsel on the blackboard that counsel specified as appearing five ridges from the core on the latent identified as appellant's left thumb on GE73 (T1353-54).

Counsel requested that Officer Levin examine the prints in court for the formations and dissimilarities described and drawn and produced a magnifying glass, since FBI Agent McDaniel had testified he used a magnifying glass in making his analyses (T1351, 792). Officer Levin refused to use the glass, because, he said, one would have to use a special glass that magnified seven to eight times,

even though he did not examine counsel's glass for its power (T1351). He refused to examine the "left thumb" latent or inked prints under the glass:

Don't even bother showing me with the magnifying glass. I can't make any comparisons here on the stand. I would have to return to my office to make a recomparison to see if I see any dissimilarities that you speak of.

(T1354)

Counsel attempted to show the jury the discrepancies he was talking about, and got permission from the judge to point out or draw the points and formations and pass the glass, latents and inks to the jurors for their own comparison. There was an immediate reaction of shrugged shoulders, shaking of heads by at least three of the jurors (by counsel's reckoning) and one lady told counsel she would be nauseous if she looked (T1355-61). The Court would later observe:

We don't know whether any of them paid any attention. As far as I'm concerned, you still have the basis for argument that none of the jurors could understand what they were looking at, they couldn't have understood the circumstances, with the help of the expert, we don't know what they saw when they looked, if they looked, we just don't know. You thought there were others, I know, and none of us is in a position to say there were or were not.

(T1451)

Counsel sought an inquiry of the jurors by the Court to determine if they were able to make a comparison based on the materials they had. This was denied. Counsel was concerned with alienating the jurors by further asking them to perform a task they were physically unable to do (T1360-70). The Court opined,

I am concerned whether the jury should look at these at all. I don't know whether they can make

any sense out of it...without assistance from the expert in understanding...although we have an expert he wasn't able to assist them. I'm concerned about these things.

(T1362-63)

I don't see how the jurors can do much without the help of the expert. I don't see any point, at least at the present stage, I don't see any point in inquiring.

(T1364)

The point is perfectly clear that he is not prepared to tell us anything about how he reached his conclusions about the fingerprints. We don't have blow-ups, and you can argue whatever you want from that. If Mr. Lavin is content to rest with that, then he is stuck with that situation.

(T1366)

We don't know whether he's made an error or not because we have never seen the basis for his conclusion.

(T1370) (emphasis supplied)

Counsel had anticipated this problem when he decided to contest the identification of these three specific prints and learned for sure that Officer Lavin would not come to court with blow-ups. He had argued to the court that in this situation, the absence of blow-ups would deprive appellant of a meaningful opportunity to cross-examine and would thus be violative of the Constitutional right and the Federal Rules 701-705, and the right to trial by a jury who is supposed to be the ultimate judge of the facts (T1286-89). At that time counsel did not know that the expert would not even be able to respond to questions without the charts. The Court ruled:

Let's hear from the witness and if it develops that his testimony is inadequate and that your cross-examination is inadequate because we don't have charts, then we will consider whether or not

he will be required to produce charts, blow-ups.

(T1289)

Counsel renewed all these objections during and after Officer Lavin's testimony (T1355-70, 1375, 1382-85).

There was a lunch break in the middle of Officer Levin's testimony. He resumed the stand and on redirect was asked again his opinion about the identity of the three prints, having returned to his office during lunch to look at them again. He gave the same opinion of identity but still was unable to respond to the questions previously posed. He made no detailed analysis, no notes, and did not look for the specific points and formations described and drawn. He did not bring his "special" glass to Court (T1385-90). Asked if he was giving the same testimony he'd given before lunch, he replied, "I am saying the same thing, yes" (T1387).

The Court did not preclude the testimony nor order that charts be made, ruling finally that, "I don't agree with you that this is not subject to cross-examination. I think it is" (T1385). Over objection, the Court charged the jury that they could accept the expert's opinion under these circumstances (T1674, 1488-89). The Court also charged, "You, however, and not the witness, are the judge of the facts. You must examine all the evidence in the case, including the evidence which forms the basis, if any for the opinion of an expert" (T1673).

During deliberations the jury asked to see and analyze the handwriting exemplars and charts (T1680, 1685). The handwriting analyses had been hotly contested by both defendants (see

infra), and the prosecutor argued with respect to those charts and exhibits

I just wish you would go through these checks and remember that check and look at the ones he said he didn't remember...I would ask you to compare, one, the handwriting on the checks and, secondly, look at the hundred dollars on the Scott Murphy deposit ticket. Ladies and gentlemen, I don't think you have to be a handwriting expert to know that in my eyes - you be the judge. Are those two hundreds similar. These exhibits are going to be available if you want to look at them. I suggest that if you have any questions about them, you do that.

(T1517-18) (emphasis supplied)

4. The Handwriting

The government's "expert" on the identification of the handwriting on the bank documents as that of appellant was Douglas Cromwell,* twenty-nine years old and just three months in his first government job with the Bureau of Alcohol, Tobacco and Firearms, and his first job outside his employment with the man who had trained him (T803, 809, 843). This testimony was his first for the federal government (T805). He recalled having testified before in the Southern and Eastern Districts two years ago and in other courts, but could not recall the name of one case in which he had testified (T832-835). He was not a regular member of the American Society of Questioned Document Examiners, because he hadn't passed their examination, having failed to complete the test in time and needing to complete some additional questions (T837-840). He

* Separate testimony as to a comparison of Frank Mangan's personal income tax returns and IRS personnel files with the printing on the questioned 1040's was given by Luciano Caputo. This testimony was severely impeached by Mr. Mangan's counsel (T556-745).

thought the Society required three or five years experience for admittance to regular membership (T840-841), whereas Mr. Cromwell had regarded himself an expert in the field of handwriting analysis in his second year of training and was rendering opinions on the subject in his first year of training, at a time when he was learning for the first time the numerous other disciplines, techniques, and instruments in the broad field of questioned document examination and spending only part of the time on handwriting (T823-829, 837). He was not a member of the American Academy of Forensic Sciences, and had had no academic training in the field (T841). Mr. Cromwell testified that expertise in the significance of individual handwriting characteristics, as distinguished from general style characteristics, could be learned only by personal acquaintance with large samples of handwriting, but that he had examined only a small number of specimens during his training, relying more on the studies of other people on the subject. However, he hadn't read an article by Livingston on the "Frequency of Certain Characteristics in Handwriting," and testified, on the contrary, that this expertise couldn't be learned from books and articles (T846-850). During his training he never had the opportunity to check the accuracy of his opinions against proven facts, and he disagreed with the recognized expert Wilson Harrison, with 24 years experience in the field, that such training was essential if the student were concerned with avoidance of repeated mistakes (T851).

Objection to Mr. Cromwell's qualifications as an expert were overruled, as was counsel's motion that the Court refrain from qualifying him as an "expert" in front of the jury due to the pre-

judicial effect this would have on their judgment of the validity of his ultimate conclusions (T853, see also T562).

Mr. Cromwell was called in Washington on the Friday before the Monday of May 23 and asked to come to New York for testimony on the 23rd. Hearings in this case were already in progress at that time. A senior examiner in his Bureau was contacted initially and couldn't make it (T961-966, 1093). Mr. Cromwell arrived in New York as scheduled, examined the 26 bank documents (the questioned documents), the approximately 100 American Banquet checks (the known documents) and 5 yellow legal size sheets of paper written by appellant on government demand (the request samples, referred to in the transcripts as "Q samples"). He concluded, on that same day, that the known and questioned documents were written by the same person* (T963-966, 948, 958-959). He prepared a chart, but put on the chart as a known document, an American Banquet Corporation check that Mr. Bertsch had not identified as the writing of appellant.** This was deleted from the chart, over objection, and the prosecutor recalled Mr. Bertsch to have him identify the check. Also deleted were two questioned bank documents which had not been received in evidence. Several bank documents which Mr. Cromwell could not identify were not included on the chart. Objections to

* Mr. Cromwell did not compare the 100 "known" checks to determine if they were all written by the same person. Despite the other evidence in the case that others may have written some of those checks and despite expert opinion that this was the obligation of the document examiner, Mr. Cromwell did not regard it as his duty in a criminal case. Notwithstanding this failure to intercompare, he testified the checks were "repetitive" (T1063-64, 1077-81).

** In open court, when counsel was attempting to learn how this check got on the chart, but did not appear among the identified knowns, the prosecutor stated that counsel had perused the original footnote continued on next page

the chart for all these reasons were overruled (T960-966, 975-976).

Mr. Cromwell was never supplied with known exemplars of John Bertsch nor asked to make an analysis, even though he should have been asked to examine the knowns of all parties involved. At least one of the questioned documents was possibly a forged imitation of the other questioned documents. People who write alike have a natural tendency toward imitation (T1089).

Mr. Cromwell testified that the basis for handwriting comparison was the appearance of consistent, unconscious, individual characteristics in both the questioned and known documents (T988-990, 1015-20). The general appearance of writings is not determinative of common authorship, because two different people can deviate in the same way from the general copybook style taught in schools. Shown a chart containing the very similar-looking signatures of twenty-one different people named "Smith," Mr. Cromwell testified, "all Smiths write alike" (T1022-24, 1037, 1043).*

Unlike the fingerprint examiner, Mr. Cromwell was able to give the specific points of his comparison. He enumerated them:

- 1) the capital "T"'s written as a seven, sometimes with a loop and a drag line at the bottom;
- 2) the unconnected "h" following the "T" and the unformed bowl on the "h;"
- 3) the dropping of the terminal

Footnote continued from preceding page

pile on many occasions at counsel table, suggesting chicanery on counsel's part. The Court refused to strike the remark or admonish the prosecutor or instruct the jury to specifically disregard it (T923-948).

* When these charts and others were shown to the witness and the jury, again the prosecutor accused counsel of impropriety in open court, and requests for instructions and striking the remarks were denied (T1024, 1030-31).

stroke of the "o" to make it look like an "a;" 4) the straight line for an "n" in the words "and" and "thousand;" 5) the consistently printed form of the "J" in the John McCarthy signatures; 6) the significant and consistent placement of the small "c" at or near the top of the "M" in the "Mc" of McCarthy; 7) and the ill formed final "y" in McCarthy; the terminal stroke of which is used to make the "t" crossing (T949-959, 977-988, 1005). Since there were no known business standards of appellant that included the latter three characteristics, these characteristics were used by Mr. Cromwell to determine only that all the McCarthy's and Murphy's were at least written by the same author.*

Under cross-examination, Mr. Cromwell admitted that the former four characteristics were common deviations from copybook style, that a lot of people write with those characteristics, and that an identification should not be made on the basis of a group of such general style characteristics (T1046-59, 1091-92). Mr. Cromwell was shown charts from various texts illustrating the common frequency of these characteristics and these charts were passed to the jury, but, over objection, the Court refused to receive them in evidence (T1030).

Mr. Cromwell explained that, notwithstanding any number of similarities between two handwritings, one significant and unexplained dissimilar characteristic would negate an identity (T996-997). He

* These characteristics were shown to be significantly different, however, from the writing of appellant in the samples requested by the government (see infra).

conceded that in all the "Scott" signatures in the questioned documents, the bottom of the "S" looped around and connected to the next letter, that among the 100 "known" checks the capital "S" is not once made with the bottom loop. He testified this difference could be explained by the absence of an "Sc" combination in the "known" checks and that the bottom loop was present in the "L"'s of the known checks, although he also testified that two different letters could not be compared for the purposes of reaching a conclusion of identity (T1006-7, 1037-39, 1061-62).

On demand of the government appellant had provided handwriting samples. On May 10, 1977, long before there was even a handwriting opinion against appellant, let alone charts and discovery, he had been given written instructions prepared by the prosecutor, and in compliance he wrote and printed approximately fifteen items of amounts and names and addresses, ten times each, for a period of two hours (T511-514, GE51, GE50). Mr. Cromwell testified that the writing on these samples was dissimilar when compared to the questioned documents (T960), that he could not base an opinion of identity on these samples of appellant's known writings* (T996), and that he, "wouldn't call it disguised at all" (T960, 989). Some of the significant dissimilarities between the questioned writings and the request (Q) samples were: 1) appellant never uses the printed form

* The other, contested, "known" writings, the ABC checks, contained only seven amount items upon which the ultimate comparison was based, as opposed to the 5 pages of ten times written items in the request samples (T1060-62).

of the "J" in the request samples, even when he was directed to print (T990); 2) appellant never uses the final stroke of the "y" to cross the "t" in "McCarthy" (T1003); 3) appellant's final "n" in John is consistently distinct, rather than unfinished like the questioned writings (T1002); and 4) appellant places the small "c" in "McCarthy" at the base line, rather than near the top of the "M" as was the habit of the unknown writer (T992-993).

Mr. Cromwell testified that since writing is an unconscious habit, the characteristics of the writer will generally intrude even when he is consciously attempting to disguise them. If a sufficient amount of writing is done on request, it is very difficult to maintain a consistent pattern of disguise, and the request samples are significant for comparison purposes (T995). The true habits of the writer will appear usually in the latter part of the repeated writing where his guard is down and fatigue takes over, and it is impossible for a writer to disguise or fail to exhibit his true habits in the more inconspicuous features of writing (T989-990, 1015, 1017-18, 1021). Mr. Cromwell also agreed that some characteristics, like the alignment of letters relative to the base line of the writing, is a fixed characteristic which rarely changes, even when disguise is attempted (T1018). Thus, according to these principles, the difference in placement of the small "c" in "McCarthy" between the request samples where Mr. Cromwell found "no disguise at all" (T960, 989), and the questioned writings, where Mr. Cromwell found that placement of the small "c" to be a significant characteristic of the questioned writer (T982, 992-993, 1020), was a single, significant and consistent difference

in an inconspicuous feature in both writings. Appellant consistently placed that small "c" at the base line throughout the request samples,* and this consistency evidenced a true habit of his which was significantly different from the high placement of that "c" in the questioned writing (T997, 1001-2). And, since there was no evidence of disguise in appellant's request samples, any significant differences "just comes out that way" and should, if Mr. Cromwell's analysis is consistent, lead to a conclusion of different writers (T1018-19).

However, when this small "c" difference and the other differences previously described were brought to Mr. Cromwell's attention, he changed his testimony and thought the request samples "might" be disguised, but he'd give appellant the benefit of the doubt that they were not disguised (T994), and he would call the request samples merely "abnormal" in that they were carefully written. This latter conclusion, Mr. Cromwell agreed, was necessary to his whole analysis of identity, and followed it, for if the request samples were not labelled "abnormal," i.e., if they were the

* Except for the very first group of names he was asked to write, when he placed the "c" at the top of the "M" as he was "told" to do by the model provided by the prosecutor which also placed the "c" at the top. Throughout the rest of the 15 items, appellant's unconscious habits prevailed, and as Mr. Cromwell explained, his true characteristics appeared in the latter part of his writing. During their deliberations, the jury asked to see the request samples. Because of the central importance to the defense of the placement of the small "c" and the contention that the single initial occasion when it was inconsistently placed at the top of the "M" was due to the instructions contained in the model, where it was similarly placed, counsel asked that the model be sent to the jury with the exemplars. This request was denied (T1680).

normal writing of appellant, he would have to refrain from a conclusion of identity of appellant as the writer of the bank documents in this case (T1013-14, 996).

Mr. Cromwell agreed that judgment necessarily played a part in handwriting analysis, because the handwriting of the same person could differ on different occasions (T1097-98), and he used his own judgment in this case (T1100). But, he refused to concede that handwriting analysis was a subjective process (T1098), and disagreed with the statement of another expert, Wilson Harrison, in the book Suspect Documents that

'The most definite opinion expressed by a document examiner is subject to the unspoken qualification 'as far as my skill allows,' for unless he saw a specimen of handwriting being written, he is unable to swear to its authorship, however skilled he may be.'
(T1098-99)

5. The Mailings

The government sought to satisfy its mail fraud charges with Treasury Department certificates and attached xeroxed progress sheets indicating that large quantities of checks, including the five checks involved in this case, were issued (GE29, 29A-E). In some cases the initials where mailing was supposed to be indicated were absent or unclear, and nowhere on the sheets was the date of mailing shown. Appellants objected to this evidence as not subject to cross-examination on an issue where mailing was the gravamen of the offense and the statute of limitations was a close question; there was no foundation for any exception to the hearsay bar to the

admission of the progress sheets, and the Disbursing Officer who signed the certificates had not been produced (T77-87).

A stipulation was read to the jury to the effect that, if called, the Disbursing Officer would testify only that it was the practice to mail the checks on the date shown on the face of the check (T1314-15). Appellants objected that general practice was insufficient proof of the mailing of the individual checks in this case, but the motion to dismiss the mail fraud counts were denied (T1066-70, 1292).

Motion to dismiss the mail fraud counts was also made when, having received the grand jury minutes of the government agents, it was discovered that the government presented no evidence of mailing in the grand jury. Agent Remstein testified in the grand jury that all the checks but one were "issued," and in only one case did he say a check was "mailed." There is no indication of the source of his knowledge that the one check was "mailed," and the grand jury was not informed of the hearsay nature of such testimony, if it was that and not mere assumption. As to the other checks, "issuance" was not evidence of mailing, and nothing more was offered the grand jurors on this essential element of the mail fraud offense. The motions to dismiss the indictment on insufficiency of evidence before the grand jury and on Estepa grounds were denied (T551, 665-667, 1252-75, 1292-93).

Also renewed at the close of the government's case was the pre-trial motion to dismiss the mail fraud counts as inappropriate under the Southern District decision United States v. Henderson 386 F. Supp, 1048 (SDNY, 1974). This motion was once again denied (T1444).

6. The Frank Mangan returns and standards

The government offered no evidence to authenticate or identify the handprinting on Frank Mangan's alleged personal joint income tax returns and his IRS personnel records which it used as his "known" writings for the purpose of handwriting comparison. Objection to their admissibility for this purpose and on this ground was overruled by the Court (T473-496).

Objection to the use of the returns was made on the additional ground of violation of the Tax Return Act of 1976, in that no Court order had been obtained prior to their use in these proceedings (T496-503, 527-545). The Court ruled that the objection was untimely, that he could authorize the disclosure nunc pro tune on the application of the Assistant United States Attorney during colloquy on the motion to preclude, that the penalty for non-compliance was nowhere designated to be suppression, and that an order was probably not required anyway under certain provisions of the Act (T545-551).

The government also used Frank Mangan's personal returns as substantive evidence. An IRS accountant, John Petito, testified that the partnership losses on the Mangan returns and the questioned returns were similar transactions, and that an analysis of the Mangan returns showed a shortage of \$12,000 in the buying and selling of stocks that could have been supplied by cash, a margin account, other stocks, or pre-existing accounts. These returns had been audited in 1974. Objection to the testimony as a misleading attempt to imply that the shortage was satisfied by proceeds from the scheme, without evidence to that effect, was overruled (T1168-1221, 1493).

Pre-trial and intra-trial motions for severance of the trials of the two brothers had been denied. It was agreed prior to trial that objections as to one would apply to the other unless

otherwise indicated, and the Court charged the jury that in considering the guilt or innocence of each defendant the jury might determine the extent of participation of the other (T1643).

7. Ray Nazzarro for the Defense

Mr. Nazzarro testified that he had known appellant since 1970. In the latter part of 1971, he helped appellant as a relief manager at the restaurant and bar concession at Tall Tree Country Club. Waitresses, bartenders, and other relief managers, including John Bertsch, worked for appellant there. In the office adjoining the bar, which was also used for the Kevin Mangan Catering Corporation, appellant kept various blank business forms, partnership forms, tax forms, invoices, check off lists, corporate certificates and resolutions, and checks. Appellant was a "stickler" for forms (T1399-1402, 1439).

By the end of 1971, appellant moved his catering business to an office in Sound Beach, Long Island, where the American Banquet Corporation was begun. Mr. Nazzarro and John Bertsch helped in the physical move from Tall Tree to Sound Beach and in the renovation of the new offices. In the process of that move, piles of the blank business forms from Tall Tree and additional forms that were obtained for the new business were placed on a table for filing and distribution. John Bertsch continued to work in the new offices which were restricted to appellant, Bertsch, Nazzarro and sometimes a fourth person. Bertsch handled these forms, as they all did (T1403-1407).

Although appellant signed the American Banquet checks, others in the office, including Nazzarro and Bertsch, often filled

in the payees and amounts. Mr. Nazarro saw appellant writing during that period and knew his handwriting then. Among the American Banquet checks in evidence, Mr. Nazzarro identified seven (DE P*) as possibly having been filled in by himself or another employee. He could not identify the amounts and payees on the remainder of the checks as the handwriting of appellant. He had not seen appellant's recent handwriting, and could not identify the request samples (GE50) as that of appellant (T1408-13, 1419-20).

On March 22, 1972, ** he and appellant began a friendly tradition of celebrating each other's birthdays. It was in fact a turning point in their friendship, hence Mr. Nazzarro's recollection. He was moving into a new house that day, and appellant helped him. He was in appellant's presence the entire day, and at night they went out to celebrate (T1414-16).

Mr. Nazzarro and appellant started a small billboard advertising company called Village Crier.***They discussed the idea with John Bertsch. Appellant did not give Nazzarro money to start the business; money from prospective sales was used to finance it. There was no intial investment of \$500. Appellant never told Nazzarro that there was a tax refund scheme or that money for

* Check numbers 674, 511, 702, 589, 694, 668, 588.

** The day one of the large bank withdrawals of scheme money was made (T126, GE22D).

*** Bertsch had testified that Nazzarro told him that appellant had given Nazzarro scheme money (\$500, although this amount was accidentally omitted by the Court reporter (T1682-84, 1699-1703) to start the business. IRS Agent Robert Frey testified that Bertsch never told him about this (T1307).

Village Crier was from that scheme. Nazzarro never told Bertsch about a tax refund scheme. A bank account in the name "Village Crier" was opened and the initial deposit was \$113.22. There was no \$500 deposit. The bank statements were received as evidence (DE Q, T1416-18).

"James Morrow" was a commonly known name that appellant used in his catering business to increase the apparent size of his staff, since he had started with his own name as the Kevin Mangan Catering Corporation (T1419, 1433).

8. The Stolen Checks

The American Banquet Corporation cancelled checks, which were used by the government as standards for their handwriting analyses, were stolen from appellant's office and turned over to the Suffolk County District Attorney who then furnished them to the government along with other stolen documents from appellant's office.

On May 29, 1976, on a Memorial Day weekend while appellant was away on vacation, John Calandra, a man who had previously terminated his business association with appellant in the Express Messenger Service,* broke in and entered appellant's office build-

* Although Calandra had been associated with appellant in the Express Messenger Service, a certificate of discontinuance was signed by him in 1974 and filed before the break-in (H46), and Calandra was not involved after that. He continued to do something in that business, however, until March, 1976, when, with appellant's lawyer, he agreed to a letter of dissolution, and turned over the keys to the office (H55-56, 59-60, 63). Some of the checks he stole from appellant were drawn on the Express account, and Calandra was able to cash them with only appellant's signature (H153). He had no business interest in American Banquet Corporation (H31, 67, 44).

ing at 4020 Hempstead Turnpike in Bethpage, Long Island. While his mother stood guard in the waiting area, Calandra, using a hatchet and screwdriver pried the wood and triggered the lock of the door to appellant's private office and "forcibly" opened the door and obtained the keys to other doors in the office (H3-4, 53-54, 143, 208). Calandra intended to take documents to give to the District Attorney (H207) and he was going to go "straight to the Suffolk County Executive" (H83). Calandra took documents on this first occasion and on two other occasions over that weekend. After the initial break-in, he called Lewis Demott, whom he knew was seeing a lawyer (H12) and whom he believed had been told by a lawyer for Suffolk County to get any documents he could lay his hands on (H211). Calandra told Demott that he had gotten the keys and invited Demott to enter and take documents (H12). Demott, and a third person, Richard Gerace, later joined Mr. Calandra in his subsequent entries into the offices. They took the American Banquet Corporation cancelled checks, a huge pentaflex file of documents, the books of all of appellant's corporations, deposit and withdrawal slips, a file on M.K. Mangan, a social security card, and blank checks, signed by appellant, which Calandra later cashed (H3-9, 31, 41-44, 67, 146-153). These men had no business interest in the American Banquet Corporation, and Calandra did not know whether or not he had taken any Express Messenger Service documents (H31, 67, 41, 44). Gerace took credit cards and a file on Jeanne Laimit, a secretary for appellant (H220).

After the Memorial Day weekend, appellant's secretary discovered the break-in, and when appellant returned to his office

late one night, he found Calandra in the offices rifling the files again. The police were called. Calandra showed them the keys, and said he had a right to be there (H12-16). He was arrested again in October, 1976, when he was parading in front of the building with a sign denouncing appellant's businesses (H70-72).

Two months after the break-in, Calandra, Demott and Gerace turned over appellant's documents to the Suffolk County District Attorney's Anti-Corruption Bureau (H6), in the hopes of implicating appellant and American Banquet in a conspiracy to obtain catering contracts from the County (H125-126, 82-83). Detectives Jim McGready and Ray Marcheschi of that Bureau, to whom Calandra reported, asked him about the break-in after the documents were turned over to them (H77, 116). Calandra "probably" discussed with them his business problems and that of Gerace and Demott, and the alleged American Banquet scheme (H140-141). The detectives gave Calandra the impression that what he was doing was helpful and valuable and that they could use whatever he could get for them (H202).

Calandra admitted to returning to the offices and taking more documents after contacting McGready and Marcheschi. He testified that he did so only once when he took some credit card receipts from a trash can. He sent those to McGready. Other documents dated September and October, 1976, were, however, among those in the pentaflex file (H199-201).

In the course of his continued investigation after the files were given to the District Attorney, Calandra learned

from John Bertsch's brother that Bertsch had said he was involved in an IRS fraud with appellant. Calandra thought that, given the ABC evidence he'd already secured, it would be a good idea to bring Herbert Bertsch to the DA (H129-30, 223-224).

Lewis Demott testified that he was an accountant for the department of Citizen Affairs of Nassau County and that he was specifically charged with the books of nutrition programs for the elderly. In 1974, Demott went to the Nassau County District Attorney and Catholic Charities to tell them he believed appellant and ABC were engaged in some sort of fraud in procuring catering contracts in the elderly food programs. The District Attorney told him that this was a Suffolk County matter, asked him if he could produce records, and advised, "I wouldn't tell you to take them, but under the circumstances do anything, it's a civil, it seems like a civil matter" (H384-385, 418).

Demott testified that when he went into appellant's office with Calandra, he had no keys but was unaware that Calandra had broken in (H406, 400). He thought he had an obligation to take documents, because he had been an officer of one company, Tripod Development, and had lost money in it and because he wanted to rectify abuse of the food for the elderly program (H402, 405, 414). He was not an officer or employee of the American Banquet Corporation; he took ABC documents, and told Detective McGready that he took only his own records. He didn't tell McGready he had no interest in ABC (H402-403).

Detective Raymond Marcheschi testified that Gerace, De-

mott and Calandra came to see him in November, 1976, and brought files of ABC, Vast Industries, Tripod and Comstock. Demott said he'd been part of the company, had been swindled, and had taken the files from the office. The detective didn't think Demott was an officer of all the companies, but that he was an officer of at least one of them. He was under the "impression" that Demott was working at 4020 Hempstead when he took the documents, yet Demott had told him he was a Nassau County Executive employee in the Department of Aid to the Elderly at the same time (H232-241). He never questioned Demott about the apparent conflict of working for the County in this capacity while being privately interested in ABC, the catering corporation that Demott was complaining was defrauding his own County department (H249, 260-262).

Both Demott and Calandra said they'd been involved with American Banquet Corporation (H249). Calandra said, "these are his records or records that he had in his custody," and that he had been "poking around" (H245, 252). Since Calandra shied away from explanations, the detective did not press him or conduct a corroborative investigation (H249-50). His partner, McGready, contacted Nassau County about the documents (H253).

Detective Marcheschi's office "hung on" to the documents which were of no help to their case, and they later turned the documents over to the IRS (H242, 248).*

* When they did so, to Inspector Frey, they told Frey that Calandra "went in and took them" and that Calandra was "cooperating" with them. Frey discussed the location of the documents with Calandra, but did not discuss the circumstances of acquisition. He noticed ABC documents, but never asked Calandra if he was an officer of that corporation. Frey used the documents in preparing his IRS case against appellant (H513-522).

EDITOR'S NOTE

Pages 38 were missing at time of filming. If, and when obtained, a corrected fiche will be forwarded to you.

Suffolk County terminated its ABC investigation because they found no corroboration and criminal charges could not be proved, but Marcheschi arrested Frank Mangan for the IRS in March, 1977 (H249-51) (See also ADA Thomas Watson at H157-166 and Sgt. Robert Snow at H295).

Officer Kevin J. McCready testified that neither Calandra nor Demot told him they were officers or employees of ABC (H322, 324), yet he saw ABC, Vast, J-K, Comstock, Express, and Landline documents among those given him by those two (H322). Calandra told McCready that he took the documents out of appellant's office and had been arrested for it. McCready phoned central records and the 8th Squad in Nassau County and neither office responded with a burglary report (H324-338).

McCready also assisted the IRS on Frank Mangan's arrest (H361).

Sergeant Robert Snow, McCready's and Marcheschi's supervisor in the Anti-Corruption Bureau, testified that McCready inquired of Nassau County about a burglary, because he assumed from what Calandra and Demott told him that there had been a burglary (H297). McCready learned that the burglary of 4020 had been reported as a burglary, but that Nassau County had declined to prosecute (H295-296).

Police Officer Kenneth Macsi prepared a report on the June 3, 1976, complaint of appellant against Calandra that Calandra had been in the offices without permission. A case file was begun, and Officer Macsi returned to 4020 more than once on additional complaints by appellant against Calandra (H435-455).

Detective John Eannel sent another detective to investigate the June 1 complaint by appellant's secretary that files were missing from the office. Detective Eannel learned that there was another complaint three nights later and that Calandra was arrested inside the office. He interviewed appellant, his former secretary, Jeanne Laimit, and Calandra and reviewed a list of stolen documents reported by appellant (H477), and thereafter decided to arrest Calandra. Instead, he turned over all the cases, including four complaints by appellant against Calandra, to the District Attorney who, in December, 1976, decided not to prosecute (H470-477, 495, 498-499).

Detective Eannel brought with him to court the various case folders on these complaints. Case reports were filed because they are required procedure in the investigation of a felony. One in this case is entitled "Burglary Information" and is so characterized when the investigating officer thinks a burglary has occurred. Calandra told Eannel he had taken what belonged to him, but upon advice of his rights and his lawyer, Calandra refused to give up the documents or respond to specific questions (H485-488, 495).

An inquirer could have learned about the open case and its files by giving the complainant's name or the address of the building involved (H492, 494).

Following the taking of testimony on the hearing to suppress, as above described, the Court heard argument, and rendered an oral opinion denying suppression (H534-539). Both the Court and the prosecutor, in an attempt to obviate needless testimony on the issue, agreed there had been a burglary.

COURT: I'm satisfied there was a burglary.
(H401)

AUSA LAVIN: There was a break-in, we all
know that.
(H89)

AUSA LAVIN: We already know there was a break-in.
(H479)

The Court found, however, that

Calandra's first contact with the Suffolk County
DA was in November, 1976, well after he took the
documents. He had had no contact with law enforce-
ment officials about the documents before or at the
time that he took them...the exclusionary rule
applies only to searches by the Government or to a
private person acting on the instigation of the
Government or in concert with the Government.
(H535)

ARGUMENT

POINT I

THE REFUSAL OF THE GOVERNMENT FINGERPRINT
EXPERT TO DISCLOSE THE SPECIFIC ANALYSIS
UNDERLYING HIS CONCLUSION OF IDENTITY,
DEPRIVED APPELLANT OF HIS CONSTITUTIONAL
RIGHTS TO CONFRONTATION AND CROSS-EXAMINA-
TION AND TRIAL BY JURY AND VIOLATED THE
FEDERAL RULES OF EVIDENCE. THE COURT'S
INSTRUCTION THAT THE WITNESS WAS AN EXPERT
WAS PREJUDICIAL

By refusing to answer specific questions directed at
the details of its fingerprint analysis, the government, through
its fingerprint examiner, effectively precluded cross-examination
that may have raised doubts about the validity of the analysis.
As with any scientific or technical opinion, a fingerprint opinion
is only as good as its underlying empirical process (International
Paper v. United States, 227 F.2d 201, 205 (5th Cir. 1955)), and if

proposing counsel cannot engage the expert in a detailed examination of that process, he and the jury are left with the take-it-or-leave-it opinion of a witness whom the Court has instructed is an "expert" in that field. This is especially prejudicial when the defense may constitutionally rely on impeaching the government's proof to establish a reasonable doubt without any burden of its own to produce countervailing testimony.

The government cannot justify its thwarting of due process in this instance; no privilege protected the empirical data which it simply did not supply due either to laziness and disregard for its obligation to be available for questioning or due to a strategy which affirmatively sought to avoid a detailed analysis. Either way, the government felt assured that the jury would accept bald opinion of its "expert" on the basis of his credentials, source of employment and government vouching, and the standard qualifying instruction from the Court, and that his refusal to be prepared to answer questions directed at the details of the analysis would be of little moment especially without a defense expert in contradiction. Appellant submits that this tactic is impermissible under an adversary system in which the government, as a theoretically equal party, has the burden of proof after a thorough submission of its evidence to the process of cross-examination.

Furthermore, it is the jury, not the expert, who decides the ultimate issues of facts. United States v. Spaulding, 293 U.S. 498, 506 (1935). The jury must come to its own conclusion on the question of identity of fingerprints, on the basis of an analysis

of opinion and the facts underlying it, not on the basis of an unchallengeable expert opinion, and its own application of the principles to the facts. In this case with the fingerprints, as the government argued with respect to the impeached handwriting analysis, the jury should have been able to make its own comparison, albeit aided and directed by the opinion under cross-examination. As the prosecutor argued in summation,

I would ask you to compare, one, the handwriting on the checks and, secondly, look at the hundred dollars on the Scott Murphy deposit ticket.... you be the judge... These exhibits are going to be available if you want to look at them. I suggest that if you have any questions about them you do that.

(T1517-18)

It was impossible for the jury to do that with the fingerprints, because there was nothing to compare, because the expert was unable, or unwilling, to present them with the data, either orally or visually. He testified he could not present orally his analysis of the 12 points of similarity without a visual representation by enlargement, which the government did not make.* He refused to examine the prints in court on the stand with the aid of a magnifying glass which counsel had supplied, even though a previous expert had used one, and he refused to use his own "special" glass in court or to provide it to the jury even though he returned to his office during a luncheon recess to look again through it at

* Eight prints were offered by the government. Appellant conceded five of those arguing their presence was consistent with innocence. The government had made enlargements of only two of those five. Appellant attempted to attack the three other prints on the refund checks which were not disclosed until the opening day of trial and which were the most damning evidence against him.

the prints himself. He made no notes of his points of comparison; he would not describe his points of comparison; he could not say whether or not there were certain specific differences and he refused to look specifically at those points. One such point of difference, he testified, would destroy his analysis. The Court agreed that this expert was not "aiding" the jury.

although we have an expert he wasn't able to assist them.

(T1362-63)

I don't see how the jurors can do much without the help of the expert.

(T1364)

the point is perfectly clear that he is not prepared to tell us anything about how he reached his conclusions.

(T1366)

We don't know whether he's made an error or not because we have never seen the basis for his conclusion.

(T1370) (emphasis supplied)

Having argued that enlargements were necessary to an adequate cross-examination, counsel, on direction of the Court, attempted to proceed without them, but even this proved fruitless, because the expert himself was unable to detail his analysis without them, refused to use any of the aids available and offered to him, and the jury expressed inability to themselves analyze and compare the points of difference referred to by counsel on the photograph of the inked and latents. As the Court put it,

none of the jurors could understand what they were looking at, they couldn't have understood the circumstances, with [out] [sic] the help of the expert, we don't know what they saw when they looked, if they looked, we just don't know.

(T1451)

The Court refused counsel's request to inquire of them, but did agree that

if it develops that his testimony is inadequate and that your cross-examination is inadequate because we don't have charts then we will consider whether or not he will be required to produce charts, blow-ups.

(T1289)

Ultimately, however, despite its findings that the expert "wasn't able to assist" the jury, and was "not prepared to tell anything about how he reached his conclusions," and that the jury could not "know whether he's made an error or not because we have never seen the basis for his conclusion," the Court did not order the enlargements or strike the testimony, but, rather, ruled, "I don't agree with you that this is not subject to cross-examination. I think it is" (T1385). This, appellant submits, was error of Constitutional dimension.

It is quite incomprehensible that the prosecution should tender a witness to state the results of a computer's operations without having the program available for defense scrutiny and use on cross-examination if desired. We place the government on the clearest possible notice of its obligation to do this and also of the great desirability of making the program and other materials needed for cross-examination...available to the defense a reasonable time before trial. See United States v. Kelly, 420 F.2d 26 (2d Cir. (1969)).

United States v. Dioguardi,
428 F.2d 1033, 1038 (2d Cir.
1970) cert. den. 400 U.S. 825

It is not a simple matter of the weight to be accorded the testimony by the jury. The effect of such a ruling is the shifting of the burden of proof on the defense once a prosecution

expert testifies to a bare conclusion that is unchallengeable because of the withholding of the details of the expert's analysis. If the defense does not produce a contra-expert, the jury is left with an opinion by a police officer whose credentials at fingerprint analysis are displayed and whom the Court, despite counsel's objections in this case (see infra), instructs is an expert, and who is permitted in this case to bolster his testimony by an exact repetition after a second look, but again without the underlying facts. It is unrealistic to assume that a jury, especially given the popular misconception that "fingerprints don't lie," will reject that opinion, when the expert himself has effectively precluded counsel from adducing from the witness the reasons why the opinion should be rejected. As the Ninth Circuit has recognized, nothing would be given to the jury to weigh:

Because of its apparent objectivity, an opinion that claims a scientific basis is apt to carry undue weight with the trier of fact. In addition, it is difficult to rebut such an opinion except by other experts or by cross-examination...In order to prevent deception or mistake and to allow the possibility of effective response, there must be a demonstrable, objective procedure for reaching the opinion....Unless an exaggerated popular opinion of the accuracy of a particular technique makes its use prejudicial or likely to mislead the jury it is better to admit relevant scientific evidence...and allow its weight to be attacked by cross-examination and refutation.

United States v. Baller,
519 F.2d 463, 466 (4th
Cir. 1975) cert. den. 96
S.Ct 456

And the D.C. Circuit has said,

In Washington v. United States, 129 U.S. App. D.C. 29, 390 F.2d 444 (1967), we concluded that conclusory expert testimony on one aspect of the insanity defense so substantially impairs the jury's ability to carry out its function that con-

clusory testimony on that issue should henceforth be barred...the government psychiatrists presented information without crucial explanation and qualification, and the failure to explain and qualify may well have misled the jury in its resolution of Bennett's insanity defense.

United States v. Bennett,
460 F.2d 872, 877n16 (1972)

See also United States v. Brawner, 471 F.2d 969, 1006 (D.C. Cir. 1972) (en banc).

The Supreme Court has not hesitated to hold strictly to a realistic Sixth Amendment right to confrontation. In United States v. Nobles, 422 U.S. 225 (1975), the Court upheld the preclusion of testimony from a defense witness when the report of the witness' observations was not made available to the prosecution. The defense's Sixth Amendment right to compulsory process gave way to the prosecution's Sixth Amendment right to cross-examination.

[The District Court] merely prevented respondent from presenting to the jury a partial view of the credibility issue by adducing the investigator's testimony and thereafter refusing to disclose the contemporaneous report that might offer further critical insights. The Sixth Amendment does not confer the right to present testimony free from the legitimacy demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half truth.

422 U.S. at 241

See also Davis v. Alaska, 94 S.Ct. 1105 (1974); Roviaro v. United States, 353 U.S. 53 (1957). There was an analagous contemporaneous report in this case and it was not turned over. According to the expert he examined the prints and found twelve points of similarity, the very crux of his ultimate conclusion. The report, albeit unwritten, detailing the 12 points, stayed in his head and he refused to reveal it, although no privilege protected that information and a

reproduction of the report and the twelve points was immediately available. The government should not be permitted to shield their witnesses from cross-examination by presenting them as "experts" who made analyses but failed, for no excusable reason, to make the underlying data available at the time of trial. United States v. Consolidated Laundries, 291 F.2d 562 (2d Cir. 1968). This Court has so held even in situations where the government argued a privilege against disclosure, an argument unavailable to it in this case. United States v. Cardillo, 316 F.2d 606 (2d Cir. 1963) cert. den. 375 U.S. 822; Costello v. United States, 298 F.2d 99, 101-102 (2d Cir. 1962); United States v. Robinson, 325 F.2d 371 (2d Cir. 1963); United States v. Fernandez, 506 F.2d 1200 (2d Cir. 1974); United States v. Coplon, 185 F.2d 629 (2d Cir. 1950) cert. den. 342 U.S. 920; United States v. Beekman, 155 F.2d 580 (2d Cir. 1946); United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944); United States v. Grayson, 166 F.2d 863, 870 (2d Cir. 1948). See also Edwards v. United States, 312 U.S. 473 (1941); Alderman v. United States, 394 U.S. 165, 184 (1968); Dennis v. United States, 384 U.S. 855 (1965); Green v. McElroy, 360 U.S. 474, 496-97 (1959); United States v. Nixon, 94 S.Ct. 3090, 3107-3108 (1974).

Recently, this Court spoke of the importance of Sixth Amendment confrontation in the overall scheme of the Federal Rules of Evidence

an overriding concern of the Advisory Committee was that the rules be formulated so as to avoid impinging upon a criminal defendant's right to confront the witnesses against him...This preoccupation with preserving the confrontation rights of criminal defendants was shared by a Congress which established

enhanced protection for these rights....

United States v. Oates,
Docket No. 76-1100, June 3,
1977, slip. op. at 6433

If, as this Court concluded in Oates, the intention to effect Sixth Amendment rights is to be read into the language throughout the Rules of Evidence (Id. at 6454 and discussion of in pari materia reading of Rules 803(8) and 803(6)), then the Rule 705 prescription,

The expert may in any event be required to disclose the underlying facts or data on cross-examination,

would mean that "on cross-examination" counsel has the right "to require" disclosure of the underlying data. This reading of the Rule is bolstered by the Rule 702 limitation of admissability of expert testimony to situations where it "will assist the trier of fact to understand the evidence or to determine a fact in issue." The Notes of the Advisory Committee on that Rule restate the intention that the expert, may testify to principles while "leaving the trier of fact to apply them to the facts," and the Notes to Rule 704 clarify once again that an expert conslutory opinion was not contemplated by the Rules as the means for assisting the jury in determining the facts.

Under Rules 701 and 702, opinions must be helpful to the trier of fact...These provisions afford ample assurances against the admissability of opinions which would merely tell the jury what result to reach.

(emphasis added)

Although the Rules do not specifically provide for the sanction of preclusion, it is clear from the Rule 702 criterion of "admissability," the Notes to Rule 704 "assurances against admissability," the Oates disposition in this Court, and the Nobles

disposition in the Supreme Court that in the case of an absolute refusal to disclose or to be available for meaningful confrontation and cross-examination, the absolute remedy of inadmissibility, preclusion and striking of the testimony is appropriate. Of course, lesser sanctions or remedies were available to the Court below, as it recognized when it contemplated ordering the witness to produce charts. It could also have ordered that the witness review his analysis and be prepared, with his "special" glass, to give the detailed analysis of his twelve points. Instead, of course, nothing was done, and the error was only compounded by permitting an exact repetition of the expert's testimony, again without disclosure of the twelve points, after a luncheon recess during which he returned to his office to look again at the prints at the behest of the government who apparently took the opportunity for bolstering in the absence of detailed analysis.

At trial the prosecutor argued that the defense was responsible for the absence of adequate means at cross-examination, because counsel did not earlier tell the government to produce enlargements. Should this argument be revived before this Court, appellant submits that he began, through counsel, to demand reports, charts, and enlargements within days of his assignment to the case one month before trial. He continued to make these demands and to complain to the Court about government noncompliance all the way to the second day of trial, when, for the first time, after the accomplice witness had begun his testimony, photographs of the actual-sized latent impressions at issue here were furnished the defense. A continuance requested by counsel at that time was denied and the trial proceeded, over his objection. Since government inaction, not-

withstanding their access to the refund checks for five years prior to the trial and counsel's demands prior to trial caused the defense to be making an examination of those latent impressions and corresponding trial strategy in the middle of the trial itself, if, despite counsel's argument below, preserved here (F.R. Crim. P. 16), preclusion is too drastic a remedy, certainly the government should be estopped from a lateness complaint against the defense. The defense cannot be faulted for arriving at a decision on how to proceed with the prints late in the trial when the prints were not provided to the defense until after the trial had begun. In any case, the demand for enlargements had been made, and the Court indicated it would grant a continuance if it thought the enlargements necessary, ultimately concluding they were not.

But, the issue here is not charts and enlargements, it is cross-examination, and this Court has said of that, "if there is a burden in the confrontation analysis, the language of the cases apparently imposes that burden on the party favoring admission of the statement, i.e., the government." United States v. Oates, *supra*, slip. op. at 6460-61, n.38. The government expert was making the analysis here, and the facts were totally within his control, since only through his responses to questions could his opinion be tested. Since he refused even to respond to detailed questions, a circumstance which the defense could not have known in advance, the defense demand for enlargements is not at issue. And, if, as the expert testified, enlargements were necessary to an explication of his analysis, then he should not have taken the stand without them, with or without a defense request.

That such an investigation and examination was not conducted is not [appellant's] fault. Many deficiencies in the process by which we collect the evidence upon which cases like this turn, are within the prosecution's capacity to remedy and should not be chargeable to the accused if he has no control over them.

Wright v. United States,
250 F.2d 4, 9 (D.C. Cir. 1957)
(en banc)

"In addition to the consideration that the interest of the United States has in a criminal prosecution... 'is not that it shall win a case, but that justice shall be done...'...., the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." Campbell v. United States, 365 U.S. 85, 96 (1960). The witness and the government knew full well the necessity of enlargements to an explication of fingerprint testimony; they produced two enlargements, albeit of prints conceded by appellant at trial,* and they used those enlargements to detail an analysis of those prints, despite appellant's concession. In this context their failure to produce enlargements for the remaining prints indicates a strategy of giving the jury a sample analysis which was supposed to be accepted by them to cover any and all prints in the case. Yet, each print was a different piece of evidence and neither counsel nor the jury was obliged to accept proof of one fact as proof of another, or that the expert, unmistaken on one part of his analysis, was thereafter immune from error and cross-examination on another

* Appellant also conceded three other prints for which no enlargements were made.

part.

The other five prints on a bank document and 1040 form and attachments, conceded by appellant to be his prints, could, by all the testimony in the case, have been impressed there when the forms were blank. The schemer Bertsch himself admitted that appellant, a meticulous businessman, kept such forms in blank in his offices at the time the scheme was in operation, and that he Bertsch, with substantial motivation to protect himself and implicate others, worked for appellant in those offices and had access to the forms. The jury may well have disbelieved Bertsch, who, having lied initially to the IRS about his involvement and having concealed initially the fact that he had possessed and used \$25,000 of the scheme proceeds, was, by his own estimation, saving himself from a possible 40 years in jail by naming appellant as the source of the scheme. Bertsch admitted he decided at the time that he should get evidence against appellant whose business and personal affairs he knew well, in case he got caught, and that monies from the scheme he had given appellant at the time were investments in appellant's businesses in which he had an interest and which he had wanted to join ever since he and appellant met as dishwashers in Howard Johnson's and they talked of becoming partners. Bertsch admitted that appellant had gotten a head start in business and that although appellant hired him as an employee, Bertsch wanted to get enough money to become partners; he did not want to remain an employee. He had a friend Ed Quinn, to whom he also paid some of the scheme money, and who knew some accounting and with whom he later went into business (See Statement of Facts, supra, for a detailed description of Bertsch's vulnerable credibility). Bertsch actually implicated himself when he,

whose fingerprints were not found anywhere (although no comparisons were made), testified that appellant, whose fingerprints were found, always wore gloves, The implication was that it was Bertsch who was wearing the gloves, and that he was attributing his own deeds to appellant. Furthermore the 1040 forms and bank documents were invariably signed "John M" or "Jack M" (McCarthy), Bertsch's first names and middle initial. The government did no handwriting analysis on Bertsch.

Thus, the five conceded prints and Bertsch's testimony did not necessarily establish appellant's guilt beyond a reasonable doubt, nor did Mr. Cromwell's handwriting analysis. Of Mr. Cromwell, even the prosecutor was forced to admit in summation, "You may not like Mr. Cromwell" (T1517), and the Statement of Facts, supra, details the impeachment of his analysis.

The crucial and damning evidence which must have tipped the balance in the jury's mind, were the three prints on the phony tax refund checks. No one had access to those checks in blank, and, although appellant offered the possible explanation that he touched them when Bertsch was depositing them in a pile along with his veterans benefits checks, he needed every opportunity to destroy the assertion that they were his. Since this Constitutional right was denied him for the reasons stated, the error was not harmless beyond a reasonable doubt and the trial was consequently unfair. Chapman v. California, 386 U.S. 18 (1967); Harrington v. California, 395 U.S. 250 (1969).

In this context of undue weight and denial of access to cross -examination of expert witnesses, appellant also submits that

it was error for the Court to instruct the jury, over his objection, that in the Court's opinion the government witnesses were "experts." No rule of law requires such an instruction to the jury and the failure to give it has been held not to be error. Felton v. State, 252 So.2d 108 (Ct. Crim. App. Ala. 1971). Although the Court is called upon to rule on any objection to the qualification of an offered expert, the Rules of Evidence (103, 104, 1008) contemplate, as was actually done in this case, argument and ruling outside the presence of the jury, and no need or purpose is served by informing the jury of the purely evidentiary decision on the admissability of expert testimony.

On the other hand, the Court's announcement that it finds the witness to be an expert has the effect of vouching for the weight to be accorded the opinion, notwithstanding qualifying instructions on the jury's role as factfinder. The Court, who represents blind justice and neutrality, opines to the jury that they are getting the words of an expert, and the jury is supposed to make an independent judgment. Appellant submits that the Court's interjection is unnecessarily suggestive and prejudicial. Evidentiary rulings are for the Court alone. It is improper, for example, for a trial judge to tell the jury he has already ruled a confession voluntary, when they have yet to make their own determination on that issue. Clifton v. United States, 371 F.2d 354 (D.C. Cir. 1966) cert den. 386 U.S. 995; Jackson v. Denno, 378 U.S. 368 (1964); United States v. Castner, 359 F.2d 969 (6th Cir. 1966); United States v. Grunberger, 431 F.2d 1062 (2d Cir. 1970); United States v. Freeman, 302 F.2d 347 (2d Cir. 1962) cert. den. 375 U.S. 958; Amsler v. United States,

381 F.2d 37, 53 (9th Cir. 1967); United States v. Pronger, 287 F.2d 498, 500 (7th Cir. 1961). Only fairness of trial is served by refraining from such rulings, and no party loses; the credentials of the witness are still fully explored in the examination by the parties.

POINT II

LAW ENFORCEMENT ENCOURAGEMENT, PARTICIPATION IN, AND RECEIPT AND USE OF THE PROCEEDS OF A CONSPIRACY TO STEAL DOCUMENTS FROM APPELLANT'S OFFICE, WITHOUT PROBABLE CAUSE AND WITHOUT A WARRANT, REQUIRED SUPPRESSION OF THOSE DOCUMENTS UNDER THE FOURTH AND FIFTH AMENDMENT RIGHTS AGAINST INVASION OF PRIVACY AND TO DUE PROCESS OF LAW.

The prosecutor and the Court below agreed that the cancelled American Banquet Corporation (ABC) checks, which were used by the government as standards for its handwriting analysis against appellant, were the proceeds of a burglary. The Court was "satisfied there was a burglary" (H401), and the prosecutor twice stated, "we already know there was a break in" (H479,89). Indeed, the government's witness, John Calandra, testified without dispute that he used a hatchet and screwdriver to break down the lock to get at keys he had months earlier turned over to appellant when he (Calandra) finally dissolved his business association in one of appellant's companies, Express Messenger Service. He had never had any interest in the American Banquet Corporation whose checks he took from the office and turned over to the Suffolk County District Attorney who, in turn, gave them to the IRS for use in this case.

Calandra's intention at the time he took the documents was to go "straight to the Suffolk County Executive" (H83), to

give the documents to the District Attorney (H207). Calandra thought that a lawyer for Suffolk County told Lewis Demott, who assisted Calandra in the theft and who also had nothing to do with ABC, to get any documents he could lay his hands on (H211). Demott testified that the Suffolk DA told him in 1974, "I wouldn't tell you to take them [documents], but under the circumstances do anything, it's a civil, it seems like a civil matter" (H384-385, 418). Demott and Calandra were alleging that ABC was involved in a kickback scheme for County contracts.

After Calandra brought the documents to the Suffolk DA, he told them about the break-in (H73, 116), and they told him he was being helpful and valuable and they could use whatever he obtained (H202), afterwhich Calandra went back and got for the DA additional documents (H199, 202, 227-228). Calandra told Detective McCready of the Suffolk County DA's office that he'd been arrested for the burglary (H324-338). Sargeant Snow, McCready's supervisor, testified that McCready inquired of Nassau County about the burglary because he had assumed there was a burglary from what Calandra and Demott told him (H297). Detective Marcheschi, from the same office, told the IRS that Calandra "went in and took" the documents (H513-522), but he was told by Calandra and Demott that they were officers of ABC (H249), but not of all of the companies whose documents he accepted from them (H232-241), although Calandra said the records were his and he was just "poking around" (H245, 252). Since they were "shy" about answering his questions, Detective Marcheschi didn't press them on the burglary or their rights to the documents. He specifically did not ask Demott to explain his conflicting

associations with ABC, about which Demott was complaining of catering fraud on the elderly, and his position as an accountant for the Nassau County nutrition for the elderly program, about which Demott also told Marcheschi (H232-241, 249, 260-262).

Detective Marcheschi "hung on" to the documents even though they were of no use to him, and the ABC allegations were uncorroborated and the investigation terminated (H242, 248). After Inspector Frey of the IRS received the documents, he never questioned Calandra about the circumstances of their acquisition (H513-522).

Detective McCready testified he called Nassau County police and was told there was no report of a burglary at 4020 Hempstead or against Calandra (H324-338). His superior Sargeant Snow testified that McCready learned that a burglary had been reported, but that Nassau had declined to prosecute (H295-296). A Nassau County Detective, Eannel, testified there were four separate cases, with files, outstanding against Calandra and that at least one of them was labeled "burglary information." After an investigation, he had decided to arrest Calandra, but the District Attorney intervened and in December, 1976, declined to prosecute (H470-477, 495, 498-499). Anybody calling the Nassau County police could learn about the cases against Calandra if they gave the complainant's name or the address of the building burglarized (H492, 494).

Thus, the evidence adduced below reveals law enforcement participation in an illegal entry, theft, and receipt of the stolen handwriting standards used in this trial, over appellant's Fourth, Fifth and Fourteenth Amendment objectives. According to Demott and Calandra, the Suffolk County DA's office prior to the

theft encouraged them to "do anything" to get ABC documents; they broke in to appellant's office with the intention of seizing the documents for the DA, and after the theft, the DA's office took the documents with knowledge of the theft, or, at the very least, reasonable cause to believe a theft had occurred, and further encouraged Calandra that his actions were helpful and valuable to them and that they could use additional materials in their ongoing investigation of ABC, afterwhich Calandra returned to the offices and took additional documents and supplied them to the DA. At the very least the Suffolk DA was engaged in a conspiracy to receive stolen documents and in actual receipt of the stolen documents; they encouraged the theft and received its proceeds with actual or constructive knowledge of the theft, and expressed a stake in its outcome.* In Gambino v. United States, 275 U.S. 310 (1927) (Brandeis, J), the state police, at a time when the "silver platter" doctrine regarded them as private parties for the purpose of federal law enforcement responsibility, illegally seized evidence which was turned over to federal authorities who had no foreknowledge or participation in the state police (private party) illegality. The Supreme Court held the evidence should be suppressed in the federal case. Here, there is evidence of law enforcement foreknowledge and encouragement of the private party search, law enforcement motivation in the private

* "Whenever a defense of ignorance of...fact is claimed, it is recognized that one may not deliberately close his eyes to what otherwise would have been obvious to him." United States v. Squires, 440 F.2d 859, 864 (2d Cir. 1971).

party action and no legitimate private party interest, and receipt and use by law enforcement of the stolen goods. Cf. Burdeau v. McDowell, 256 U.S. 465 (1921). And since the death of the "silver platter" doctrine, the Suffolk County DA's illegal embroilment in the seizure is attributed to the IRS, who took the documents, also with actual or constructive knowledge of the search, and who "looked the other way." Elkins v. United States, 364 U.S. 206 (1971). There was no legitimate police or private interest or right in the burglary and theft and receipt and perusal of the ABC documents. Cf. United States v. Capra, 501 F.2d 267, 272 n.4 (2d Cir. 1974).

Furthermore, even if the state had no prior knowledge or participation in the theft itself, its receipt and use of the goods it knew to be stolen would under general conspiracy principles make it a participant or at least a receiver of goods to which it had no right of possession without a warrant or probable cause. Recently the Eighth Circuit has so held. In United States v. Kelly, 529 F.2d 1365 (1976), the United Parcel Service had opened some packages and uncovered pornographic materials. It called the FBI and invited them to take the goods which the FBI claimed were in plain view at the time of their "seizure" from the UPS offices. The Court held that the FBI's taking was in fact a "seizure" of private property, albeit invited by an intermediary who had no right to consent to the seizure, that there was time for a warrant and that the Fourth Amendment required one. The same situation occurred here. Demott and Calandra, who were not officers or investors in the American Banquet Corporation, had no right to consent to the Suffolk DA's seizure of appellant's documents, and the DA's warrantless seizure and holding

was outside the Fourth Amendment. See also Knoll Associates, Inc. v. FTC, 397 F.2d 530 (7th Cir. 1968); Corngold v. United States, 367 f.2d (9th Cir. 1966). This case of Fourth Amendment violation is, of course, stronger than Kelly because here, besides no warrant, the Suffolk DA had no probable cause to take, hold, and examine appellant's private papers. The Fourth Amendment condemns fishing expeditions into the private areas of a citizen's life.

The reason for the Nassau County District Attorney's failure to prosecute, despite the investigating Detective's decision to arrest Calandra and the undisputed facts adduced at the hearing below, i.e., that Demott and Calandra broke into the offices and took ABC documents in which they had no interest, is suspect. Nevertheless, these facts, which the Court and prosecutor agreed amounted to theft, were known and available to the Suffolk DA when he, or his agents, took possession of the stolen documents, and their exploitation of the basic illegal taking cannot be excused under the Exclusionary Rule.

POINT III

UNDUE RESTRICTION ON THE PRESENTATION OF
IMPEACHMENT EVIDENCE AGAINST THE HAND-
WRITING ANALYSIS AND THE PROSECUTOR'S
UNCORRECTED SUGGESTION IN OPEN COURT THAT
DEFENSE COUNSEL'S CROSS-EXAMINATION
DIRECTED AT THAT ANALYSIS WAS IMPROPER AND
DISHONEST, DEPRIVED APPELLANT OF CROSS-
EXAMINATION, FAIR TRIAL, AND DUE PROCESS
OF LAW

Restrictive rulings by the trial court prejudiced appellant's ability to successfully impeach the handwriting analysis. 1. Counsel made extensive use of learned treatises in his cross-examination of

the handwriting expert. Included in this area of cross-examination were several charts extracted and xeroxed in number from the treatises to illustrate to the jury the generally recognized common characteristics which the defense alleged were erroneously regarded by the expert as individual and identifying. Although counsel was permitted under F.R. Evid. Rule 803(18) to show these charts to the jury at the time they were being discussed with the expert, the Court interpreted the rule as precluding their receipt as exhibits in evidence and they were, therefore, not available to the jury when the jury asked to see the handwriting charts during deliberations.

2. The Defense placed much emphasis on the fact that a particular, significant and unexplainable difference existed between appellant's writing on the request samples and the questioned documents. One such difference would, according to the expert, negate an identification. On the request samples, appellant wrote the small "c" in "McCarthy" at the base line, whereas the writer of the questioned documents wrote that same figure near the top of the "M" and the capital "C." The authorities agreed that alignment of these kinds of letters are an inconspicuous and therefore a particularly revealing unconscious habit of the writer. Such a difference in alignment, therefore, would be a significant difference.

Only once in the several pages of request samples did appellant write the small "c" at the top of the surrounding capitals, the first time he was asked to write it copying it from an instructional sheet prepared by the United States Attorney who wrote the small "c" at the top of the surrounding letters. The defense argued that this first copying did not indicate appellant's true habit, because the authorities agreed that with request writings, substantial

repetition of a requested sample was necessary to obtain, in the latter portions thereof, the true habits of the author who would, toward the end, lose strength and self-consciousness and revert to habits.

During deliberations the jury asked to see the requested writings. Counsel asked that the instructional model, in evidence, be sent into the jury room with the samples, because the jury could not understand what appellant had been asked to write without the model. The model was particularly important to explain the initial placement of the small "c" according to the defense theory. The Court refused the defense request to send in the model.

3. During the testimony of the handwriting expert, it was discovered that he had used as a standard-exemplar in his analysis, an ABC check which had not been identified by Bertsch as containing appellant's handwriting. The expert testified he was told by the prosecutor that this check had been identified as a standard; however, the check had not been included in the pile presented by the prosecutor and identified by Bertsch in court. When this fact was revealed and counsel sought from the prosecutor the circumstances of use of an unidentified standard in a handwriting analysis, the prosecutor, in open court, suggested that the check was in the pile to begin with, but that counsel had removed it while looking through them at counsel table. The Court refused to strike this accusation of chicanery and falsification of evidence and merely charged that what counsel say is not evidence. The prosecutor on another occasion in open court accused counsel of something illegal or unethical when counsel attempted to present the handwriting charts to the jury. Again, the Court refused to strike these remarks.

The first two rulings were harmful error, because they kept from the jury matters in evidence or which rightfully should have been in evidence and presented only that part of the picture favorable to

to the prosecution. The charts illustrating statements from learned treatises called to the attention of the handwriting expert during cross-examination were admissible under Rule 803(18). Although the treatise itself was not admissible, according to the Rule, "the statements [themselves] may be read into evidence." The charts offered by the defense were illustrated "statements" from the learned treatises, and since they could not be "read" into evidence, the only way to receive them before the jury was visually. The purpose of avoiding the treatise itself as an exhibit, to avoid confusion and to keep out statements not in evidence, would not have been disserved since nothing on the charts was extraneous and anything extraneous could well have been excised. Their preclusion from evidentiary value depreciated them in the eyes of the jury and literally removed them from the jury's later consideration of the defense cross-examination.

This Court has accepted the evidentiary axiom that if a piece of evidence is offered by one party out of context and the context would be relevant to a full understanding of the piece offered, the other party has a right to the whole. United States v. Corrigan, 168 F.2d 641 (2d Cir. 1948); United States v. Dennis, 183 F.2d 201 (2d Cir. 1950). It was for this reason that the defense offer of the prosecutor's model for the request samples was accepted by the Court and the model was received in evidence along with the samples. There was, therefore, no good reason for withholding the model from the jury when they asked to see the request samples during deliberations, and the error was especially prejudicial since a key defense point, as described, was evidenced by the model in conjunction with the request samples.

The third error, hardly needs argument. If the United

States Attorney in open court can, without any form of disapproval or restraint from the judge, accuse counsel of distorting physical evidence by removing a document and placing it elsewhere, the jury can only be left with the impression that the government attorney must be correct. And, if the United States Attorney is able a second time, again without judicial remonstrance, to instruct defense counsel in open court, "you can't do that in this courthouse,"* it becomes clear to the jury that defense counsel is not to be trusted and hence the defense is hopelessly prejudiced.

POINT IV

WITHOUT EVIDENCE OF MAILING IN THE GRAND JURY
AND AT TRIAL AND WITHOUT NECESSARY INSTRUCTIONS
TO THE GRAND JURORS ON THE QUALITY OF THE EVIDENCE
NECESSARY TO SATISFY THIS ELEMENT,
MAIL FRAUD COUNTS, WHICH ARE, IN ANY CASE, MIS-
APPLIED WHERE FRAUD AGAINST THE GOVERNMENT IS
CHARGED IN DUPLICATED STATUTORY OFFENSES SHOULD
BE DISMISSED

The mail fraud counts should be reversed and dismissed. No evidence was presented to the grand jury that six of the tax refund checks were mailed. There were apparently no instructions to the grand jury that they were required to consider whether there was sufficient evidence of mailing and no instructions that the IRS agent testimony that one of the checks had been mailed was hearsay. The Fifth Amendment right to indictment must be read to include the right to be charged only if there is evidence presented to satisfy each of the elements of the crime charged. Mailing is the gravamen of the mail fraud offense and provides the government with its jurisdiction to prosecute that fraud. Bare assumptions that five of the checks were mailed, and hearsay, without

* Especially when in both instances the prosecutor was dead wrong.

instructions, that one of them was mailed do not provide evidence upon which a meaningful accusation under the Fifth Amendment could issue. United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972). Although it is true that Courts have refused on pre-trial motion to look behind an indictment valid on its face (Costello v. United States, 350 U.S. 359 (1956)), in this case the full grand jury minutes were revealed during the course of the trial and the facts of lack of evidence and inadequate instructions appeared. Appellant submits the Courts cannot merely look the other way and sanction indictment without evidence before a grand jury.

The evidence at trial was also insufficient in that it consisted of disbursement sheets that evidenced "issuance" and were vague as to the fact of mailing and date and which were not subject to cross-examination, and a stipulation that a disbursement officer would testify that the practice was to mail on the date of the check. This Court has recently rejected a similar attempt to prove mailing. In United States v. Robinson, 545 F.2d 301 (2d Cir. 1976), the government attempted to prove mailing (as part of its proof of theft from the mail) by relying on the assumption that it was "most unlikely" that checks that are usually mailed would not have been mailed before they were stolen. 545 F.2d at 304. Just as in this case, the only evidence was that the checks "were issued by...disbursement offices outside New York [and]...deposited in accounts of a New York business in New York banks..." 545 F.2d at 303-304. This Court rejected the habit and practice inferences urged by the government in Robinson to be drawn on the basis of what usually happened to other checks.

With respect to Robinson's guilt or innocence as to any particular check, evidence concerning other checks...was not relevant to prove that any particular check covered by the indictment was stolen from the mails.

545 F.2d at 304

In this case there was no proof of receipt in the mail, but even so, in Robinson this Court disagreed that "such proof, standing alone, would be sufficient" to prove mailing. 545 F.2d 304 n.4. Appellant submits that the ruling of Robinson must be adhered to if the element of mailing is to have any evidentiary proof requirement at all. Otherwise it is reduced to a simple assumption that "well, we all know the checks are mailed," and no proof is required.

This Court has rejected prosecutor's arguments that they should somehow be absolved from directly proving certain elements of certain crimes, that Courts and juries can infer these proofs from facts and circumstances making the absence of the ultimate fact "most unlikely." United States v. Robinson, *supra*; United States v. Profaci, 274 F.2d 289, 291-292 (2d Cir. 1960). The elements here in §1341 are statutorily mandated and must be proved beyond a reasonable doubt. United States v. Ramirez, 482 F.2d 807 (2d Cir. 1973); Perkins v. United States, 526 F.2d 688 (5th Cir. 1976).

Unfortunately, the Statute under which the government chose to bring this prosecution required more, and on that additional element the government failed - and totally failed - to prove its case. Our system of administering justice requires that a defendant, no matter how guilty he may be of some crime, cannot be convicted unless there is proof beyond a reasonable doubt that he committed a particular crime with which he is charged.

United States v. Tavoularis, 515 F.2d 1070, 1077 (2d Cir. 1975)

Finally, the mail fraud counts should be dismissed, because the fraudulent scheme against the government prosecuted under 18 U.S.C. §286 and 26 U.S.C. §7206(2) pre-empts the duplicitous charges of use of the mail which were intended to apply only to frauds on the public through use of the mails. United States v. Henderson, 386 F. Supp. 1048 (S.D.N.Y. 1974) (Weinfeld, J.).

POINT V

PURSUANT TO F.R. APP. P. 28(i), APPELLANT ADOPTS BY REFERENCE THE POINTS RAISED BY CO-APPELLANT FRANK MANGAN, INsofar AS THOSE POINTS ARE APPLICABLE TO APPELLANT

Since appellant and his co-defendant, Frank Mangan, were charged and convicted of conspiracy and since the government's theory was that they acted in concert and that as brothers they had the opportunity and inclination to cooperate in a joint criminal venture, and since they were jointly tried over their objection, and since the Court charged the jury that they may consider the acts of one defendant in determining the guilt of the other (Tl643), should this Court adopt as harmful error any of the points raised by Frank Mangan, appellant submits that the conviction against him must also be reversed. Appellant specifically joined in all motions and objections made by his co-defendant at trial.

For example, if certain evidence introduced against Frank Mangan, i.e., his personal income tax returns used as handwriting exemplars, were held by this Court to have been wrongly admitted in evidence, the government's case against him would fail to meet a proof beyond a reasonable doubt burden. His employment in the IRS could not independently establish membership in the conspiracy and any hearsay, co-conspirator statements would not be admissible against him. Since in these circumstances the jury would have to acquit Frank Mangan, it cannot be gainsaid beyond a reasonable doubt that a jury would have been unaffected in its consideration of appellant's guilt. Chapman v. California, 386 U.S. 18 (1967); Harrington v. California, 395 U.S. 250 (1969).

CONCLUSION

FOR THE ABOVE STATED REASONS, THE JUDGMENT OF
CONVICTION SHOULD BE REVERSED

Respectfully submitted,

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